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SUPERIOR COURT  
YAVAPAI COUNTY, ARIZONA

2011 MAY 16 AM 10:45  
SANDRA K MARKHAM  
JEANNE HICKS, CLERK

BY: **A CASCIO** ✓

IN THE SUPERIOR COURT

STATE OF ARIZONA, COUNTY OF YAVAPAI

STATE OF ARIZONA,

Plaintiff,

vs.

JAMES ARTHUR RAY,

Defendant.

V1300CR201080049

**STATE'S RESPONSE TO DEFENDANT'S  
MOTION TO EXCLUDE PROPOSED  
EXPERT TESTIMONY OF DOUGLAS  
SUNDLING**

**(The Honorable Warren Darrow)**

The State of Arizona, through undersigned counsel, respectfully files this Response to Defendant's Motion to Exclude Proposed Expert Testimony of Douglas Sundling. For the reasons set forth in the attached Memorandum of Points and Authorities, Defendant's Motion should be denied and Douglas Sundling should be permitted to testify in this case.

**MEMORANDUM OF POINTS AND AUTHORITIES**

**The Facts:**

On December 2, 2010, the State disclosed Doug Sundling as an expert witness in the State's 21<sup>st</sup> Supplemental Disclosure, and disclosed Mr. Sundling's publication titled: *The Sweat Lodge An Interpretation*. The State subsequently disclosed additional materials pertaining to Mr. Sundling. The State added Mr. Sundling to the State's List of Witnesses filed on March 3, 2011, to be called in the State's case-in-chief. The State offered to make Mr. Sundling available for a defense interview but, to date, the defense has not requested the interview.

1 **Legal Argument:**

2 Rule 702, Testimony of Experts, provides as follows:

3 **If scientific, technical, or other specialized knowledge will assist the trier of**  
4 **fact to understand the evidence or to determine a fact in issue, a witness**  
5 **qualified as an expert by knowledge, skill, experience, training, or education,**  
6 **may testify thereto in the form of opinion or otherwise.**

7 This rule permits experts to qualify based on their experience and knowledge. "The test of  
8 whether a person is an expert is whether a jury can receive help on a particular subject from the  
9 witness. *Bliss v. Treece*, 134 Ariz. 516, 518-19, 658 P.2d 169, 172-73 (1983). The degree of  
10 qualification goes to the weight given the testimony, not its admissibility. *State v. Mosley*, 119  
11 Ariz. 393, 400, 581 P.2d 238, 245 (1978)." *State v. Davolt*, 207 Ariz. 191, 210, 84 P.3d 456, 475  
12 (2004). Rule 702 requires only that the expert have "knowledge superior to people in general  
13 through actual experience or careful study." *State v. Superior Court*, 152 Ariz. 327, 330, 732 P.2d  
14 218, 221 (App.1986).

15  
16 Our supreme court has quoted with approval the following: "[T]he only true  
17 criterion is: on *this subject* can a jury receive from *this person* appreciable help? In  
18 other words, the test is a relative one, depending on the particular subject and the  
19 particular witness with reference to that subject, and is not fixed or limited to any  
20 class of persons acting professionally ..." (emphasis in original). 7 Wigmore,  
21 Evidence § 1923 at 29 (Chadbourn Rev.1978)." *Bliss v. Treece*, 134 Ariz. 516,  
22 518, 658 P.2d 169, 172 (1983).

23 *State v. Superior Court, In & For Pima County*, 152 Ariz. 327, 330, 732 P.2d 218, 221 (App.  
24 1986).

25 **I. Doug Sundling qualifies as an expert.**

26 Doug Sundling has safely conducted over 200 sweat lodge ceremonies over the span of  
many years and has published and updated, since 1986, *The Sweat Lodge An Interpretation*.

1 While there are no government or industry standards for sweat lodge ceremonies, it is clear Mr.  
2 Sundling is an expert in the area based on his experience and knowledge.

3 As explained below, a fact at issue in this case is whether Defendant's conduct in  
4 conducting the sweat lodge ceremony created a substantial and unjustifiable risk of death, and  
5 whether the risk was a gross deviation from the standard of conduct that a person conducting a  
6 sweat lodge ceremony would normally observe in the situation. Mr. Sundling is qualified to  
7 testify as an expert on this issue due to his knowledge, skill and experience in conducting sweat  
8 lodge ceremonies.  
9

10 **II. Standard of Care for conducting sweat lodge ceremonies.**

11 Mr. Sundling has published *The Sweat Lodge An Interpretation*. This publication sets  
12 forth a standard of care for those conducting sweat lodge ceremonies. Mr. Sundling (1) has  
13 specialized knowledge in the area of conducting safe sweat lodge ceremonies; (2) his testimony is  
14 relevant in this case and will be helpful to the jury's determination whether Defendant's conduct  
15 in conducting the sweat lodge ceremony created a substantial and unjustifiable risk of death; and  
16 (3) his testimony is relevant to the jury's determination whether Defendant's conduct was a gross  
17 deviation from the standard of conduct that a reasonable person, i.e. a person conducting a sweat  
18 lodge ceremony, would observe in the situation.  
19

20 This Court has commented on the unique circumstances surrounding this case. On April  
21 11, 2011, in the Court's *Under Advisement Ruling on Defendant's Motion in Limine No. 8 to*  
22 *Exclude Testimony Steven Pace*, this Court noted:  
23

24 In contrast, from the information provided to this Court there is no indication Mr.  
25 Pace has any specialized knowledge as to any specific governmental regulation or  
26 industry standard that applies to persons facilitating sweat lodge ceremonies or  
events. There has been no indication that he would be able to provide expert  
opinions going to the questions of whether a person who conducts sweat lodge  
ceremonies in an improper manner, as alleged in this case, creates a substantial risk

1 of death and acts in a manner that is "extreme, outrageous, heinous, or grievous so  
2 as to constitute a gross deviation from the relevant standard of conduct." *Id.* 224  
Ariz. at 200, 228 P.23<sup>rd</sup> at 937 (citation omitted.)

3 **A. Mr. Sundling's testimony is relevant on the customary practices in an arena of**  
4 **esoteric activity for the purposes of weighing whether the inherent risks of the activity were**  
5 **increased by Defendant's conduct.**

6 Mr. Sundling's testimony will provide information relating to the customary practices in  
7 an activity that is not common knowledge to most people. Like the testimony of the expert in  
8 *State v. Kahn* discussed below, Mr. Sundling's testimony is relevant for "the purpose of weighing  
9 whether the inherent risks of the activity were increased" by Defendant's conduct.

10 In *State v. Kahn*, 31 Cal.4<sup>th</sup>99, 75 P.3d 30, 4 Cal.Rptr. 3d 103 (2003), the California  
11 Supreme Court considered the conclusion of the Court of Appeals that it was proper to disregard  
12 the testimony of plaintiff's expert, a swimming coach with 40 years of experience, who testified  
13 on the proper procedures for training swimmers to perform a racing dive. In rejecting the Court of  
14 Appeals' conclusion, the California Supreme Court noted:

15 We do not rely upon expert opinion testimony to establish the legal question of  
16 duty, but we perceive no reason to preclude a trial court from receiving expert  
17 testimony on the customary practices in an arena of esoteric activity for the  
18 purposes of weighing whether the inherent risks of the activity were increased by  
the defendant's conduct.

19 *Id.* at 1017, 75 P.3d at 48, 4 Cal.Rptr.3d at 125.

20 **B. Mr. Sundling's testimony is relevant to establish the standard of care owed by a person**  
21 **who conducts a sweat lodge ceremony.**

22 **1) Defendant owed a duty of care to participants in his sweat lodge based on the**  
23 **contractual relationship with his participants.**

24 "Duty is defined as an 'obligation, recognized by law, which requires the defendant to  
25 conform to a particular standard of conduct in order to protect others against unreasonable risks of  
26 harm.'" *Gibson v. Kasey*, 214 Ariz. 141, 143, 150 P.3d 228, 231 (2007) *quoting Ontiveros v.*

1 *Borak*, 136 Ariz. 500, 504, 667 P.2d 200, 204 (1983). In evaluating the existence of a duty of  
2 care, the Arizona Supreme Court considers two factors: “(1) the relation between the parties and  
3 (2) public policy considerations.” *Diaz v. Phoenix Lubrication Service, Inc.*, 224 Ariz. 335. 338,  
4 230 P.3d 718, 721 (App. 2010). “Duties of care may arise from special relationships based on  
5 contract, family relations, or conduct undertaken by the defendant.” *Gibson, supra*, 214 Ariz. at  
6 145, 150 P.3d at 228, *citing Stanley v. McCarver*, 208 Ariz. 219, 221 ¶ 7, 92 P.3d 849, 851  
7 (2004). However, “[a] special or direct relationship is not essential in order for there to be a duty  
8 of care.” *Gibson, supra*. “Public policy, the other factor used to determine the existence of a duty,  
9 may be found in state statutory laws and the common law.” *Diaz, supra*, 224 Ariz. at 339, 230  
10 P.2d at 722. Both factors apply to Defendant in this case and support the conclusion that  
11 Defendant had a duty of care to the participants in his Spiritual Warrior event *and*, more  
12 specifically, to the participants of his sweat lodge endurance challenge.  
13  
14

15 “Whether or not a particular relationship supports a duty of care is a question of law for  
16 the court.” *Restatement (Third) of Torts: Physical Harm* § 41(e) (2004).<sup>1</sup> The issue of duty is a  
17 “legal matter to be determined *before* the case-specific facts are considered.” *Gibson, supra*, 214  
18 Ariz. at 145, 150 P.3d at 232. In Section 41, the Restatement sets forth specific relationships such  
19 as “a common carrier with its passengers” or an “innkeeper with its guests” that have been  
20 traditionally recognized as creating a duty of care. However, as noted in the Restatement, “the list  
21 of special relationships provided in this section is not exclusive.” *Restatement (Third) of Torts:*  
22 *Physical Harm* § 41(o) (2004).  
23  
24

25 <sup>1</sup> While the Supreme Court in *Gibson* did not adopt the proposed Restatement, courts “may derive  
26 guidance from the proposed Restatement regarding the importance of the scope of the  
undertaking by the defendant and the distinction between creating a risk and failing to discover a  
risk.” *Diaz, supra*, 224 Ariz. at 340 ¶22, 230 P.2d at 723.

1 As the Court in *Gibson* explained, the finding that a contractual relationship may be the  
2 basis for a duty of care has its origins in common law:

3 That particular "relationships" may provide the basis for a duty of care reflects the  
4 historical evolution of the common law, which before the nineteenth century  
5 recognized fault-based liability in "actions on the Case" between parties having  
6 relationships to each other by contract or status. 1 Dan B. Dobbs, *The Law of Torts*  
§ 111, at 259-63 (2001).

7 *Gibson, supra*, 214 Ariz. at 145, n.3, 150 P.3d at 232.

8 In the instant case, there was a contract between Defendant and the participants.  
9 Defendant received compensation from the participants in exchange for the Spiritual Warrior  
10 Event. There was a special relationship between Defendant and the participants that gave rise to a  
11 duty and standard of care.

12 **2) Defendant owed a duty to exercise reasonable care to avoid causing physical harm**  
13 **to the participants and victims.**

14 Notwithstanding the fact that a special relationship existed between Defendant and the  
15 participants based solely on their contractual relationship, Arizona courts have acknowledged that  
16 a duty of care may exist even in the absence of a recognized special relationship, and have  
17 recognized that every person is under a duty to avoid creating unreasonable risk of harm to others.  
18 In *Stanley v. McCarver, supra*, 208 Ariz. at 221-222, 92 P.3d at 851-852, the Arizona Supreme  
19 Court noted:  
20

21 The requirement of a formalized relationship between the parties has been quietly  
22 eroding in several jurisdictions. It has been eroding in Arizona as well, and, when  
23 public policy has supported the existence of a legal obligation, courts have  
imposed duties for the protection of persons with whom no preexisting  
"relationship" existed.

24 (internal citations omitted).

25 Under general principles of negligence law, "every person is under a duty to avoid  
26 creating situations which pose an unreasonable risk of harm to others." *Ontiveros, supra*, 136

1 Ariz. at 509, 667 P.2d at 209, (quoting *Nazareno v. Urie*, 638 P.2d 671, 674 (Alaska 1981)). As  
2 noted by the Court in *Gibson*:

3 This Court has, however, previously noted that “every person is under a duty to  
4 avoid creating situations which pose an unreasonable risk of harm to others.”  
5 *Ontiveros*, 136 Ariz. at 509, 667 P.2d at 209 (internal citations omitted). Similarly,  
6 § 7 of the proposed Third Restatement recognizes that “[a]n actor ordinarily has a  
7 duty to exercise reasonable care when the actor's conduct creates a risk of physical  
8 harm.” Based on such statements, one could conclude that people generally “owe a  
9 duty to exercise reasonable care to avoid causing physical harm” to others, subject  
10 to exceptions that eliminate or modify this duty for reasons of policy, such as the  
11 social host rule.

12 *Gibson, supra*, 214 Ariz at 146, n. 4, 150 P.3d at 233. Defendant's conduct in placing the  
13 participants in his extreme version of a sweat lodge created an unreasonable risk of physical  
14 harm. Defendant had a duty to exercise reasonable care to prevent such harm and he failed to do  
15 so. Mr. Sundling will testify as to the normal practices of an individual conducting a sweat lodge  
16 ceremony and the standard of care of a facilitator conducting a sweat lodge ceremony.

17 **III. Rule 403 cannot operate to preclude Mr. Sundling's testimony.**

18 Defendant argues that Mr. Sundling's website is a basis to preclude Mr. Sundling from  
19 testifying under Rule 403, citing *Jinro America Inc. v. Secure Investments, Inc.*, 266 F.3d 993 (9<sup>th</sup>  
20 Cir. 2001), (*opinion amended on denial of reh'g sub nom., Jinro Am., Inc. v. Secure Investments,*  
21 *Inc.*, 272 F.3d 1289 (9th Cir. 2001)).

22 *Jinro America Inc.* stands for the well accepted principle that defendants cannot be tried  
23 on the basis of their ethnic or racial heritage, and that parties may not make generalizations about  
24 racial and ethnic groups in order to obtain a conviction. “Allowing an expert witness in a civil  
25 action to generalize that most Korean businesses are corrupt, are not to be trusted and will engage  
26 in complicated business transactions to evade Korean currency laws is tantamount to ethnic or  
cultural stereotyping, inviting the jury to assume the Korean litigant fits the stereotype. In stark

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1 terms, Pelham's syllogism reduced to this: (a) Korean businesses generally are corrupt; (b) Jinro  
2 is a Korean business; (c) therefore, Jinro is corrupt. Our caselaw, and that of other circuits,  
3 establishes that this is an impermissible syllogism." *Jinro Am. Inc. v. Secure Investments, Inc.*, Id.  
4 266 F.3d 993, 1007.

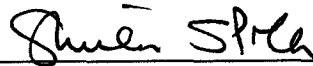
5 Mr. Sundling's opinions regarding Defendant's sweat lodge ceremony that resulted in the  
6 death of three people are not the result of ethnic bias or stereotyping, but the result of his expert  
7 opinion after evaluating Defendant's gross deviation from the standard of care to safely conduct  
8 sweat lodge ceremonies.

9 **Conclusion:**

10 It is clear Defendant owed a duty of care to his participants, that Mr. Sundling is a  
11 qualified expert in the area of the standard of care of a person conducting a sweat lodge  
12 ceremony, and that his testimony is relevant.

13 RESPECTFULLY submitted this 16<sup>th</sup> day of May, 2011.

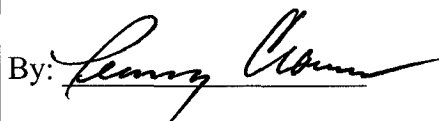
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